

**RULES
OF
DEPARTMENT OF REVENUE
INCOME TAX DIVISION**

**CHAPTER 560-7-8
RETURNS AND COLLECTIONS**

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560-7-8-.34 Withholding on Distributions to Nonresident Members of Partnerships, S Corporations, and Limited Liability Companies; Composite Return Alternative.

(1) Definitions. As used in this regulation, the following terms are defined as follows:

(a) **Distribution Credited.** The term “distribution credited” shall mean a recognition or assignment of interest in proceeds or property of a partnership, Subchapter ‘S’ corporation, or limited liability company, including a net distributive share of income which is passed through to members and which may be subject to Georgia income tax.

(b) **Net distributive share of income which is passed through to members and which may be subject to Georgia income tax.** For a nonresident member, the term “net distributive share of income which is passed through to members and which may be subject to Georgia income tax” shall include the sum of the following items:

1. The nonresident member’s share of the Georgia separately stated income, loss, deduction or expense of the Entity provided

that no deduction will be allowed for items of loss, deduction or expense which are subject to other limitations imposed on computing either Federal taxable income, Federal adjusted gross income, or Georgia taxable income, or are otherwise limited by the Internal Revenue Code or the O.C.G.A., such as charitable contributions, investment interest expense, I.R.C. § 179 expense, casualty losses, capital losses, etc.; and

2. The nonresident member's share of the Georgia nonseparately stated income, loss, deduction or expense of the Entity;

In the event the Entity owns property or does business within and without Georgia, then such income shall be attributed to Georgia as provided in subparagraph (2)(b).

(c) **Distribution Paid.** The term "distribution paid" shall mean any disbursement of funds of a partnership, Subchapter 'S' corporation, or limited liability company that is made to a member with respect to that member's interest in the entity and which may be subject to Georgia income tax.

(d) **Entity.** The term "Entity" shall mean a Subchapter 'S' corporation, a partnership, or a limited liability company which is treated as a partnership or Subchapter 'S' corporation for Federal income tax purposes and which is required to file a partnership or Subchapter 'S' corporation return.

(e) **Nonresident.** The term "Nonresident" shall mean an individual or fiduciary member who resides outside this state and all other members whose headquarters or principal place of business is located outside this state. For an individual member and with respect to distributions that have been credited but not paid, such nonresident determination shall be made on the last day of the tax year of the entity.

(f) **Individual.** The term “individual” shall mean a natural person.

(2) **Distributions.**

(a) **Withholding Requirements.** Withholding is required at the rate of 4 percent with respect to any distributions paid or distributions credited but not paid, unless exempted by this regulation or O.C.G.A. § 48-7-129, to a nonresident member. The filing of estimated tax payments by the member does not relieve the Entity from the responsibility of the withholding requirement. Unless otherwise exempted by this regulation or O.C.G.A. § 48-7-129, circumstances which require withholding shall include, but are not limited to, the following:

1. The payment of any periodic distributions;
2. The payment of any special distribution;
3. The crediting of a distribution in lieu of payment;
4. The payment of guaranteed payments; and
5. Distributions being credited but not paid. The amount of distributions credited is reduced by distributions paid throughout the year if withholding has already occurred on such distributions paid.

(b) **Apportionment of Withholding.** If the Entity owns property or does business within and without Georgia, then withholding is required only on that portion of the income which is reasonably attributable to the property owned or business done within this State, such portion to be determined as provided at O.C.G.A. § 48-7-31. That portion reasonably attributable to the property owned or business done within the State shall be computed based on either facts and circumstances existing at the time the distribution is paid or credited; or the current year’s facts and circumstances with regard

to allocable and apportionable income and the prior year's apportionment factor, if current year information is not yet available.

(c) **Annual Distributions Less than \$1,000.00.** An Entity is not required to withhold tax for a nonresident member if the aggregate annual distributions paid or distributions credited to the nonresident member are less than \$1,000.00.

(d) **Withholding Under other Provisions of Law, Ordering, etc.** Distributions paid or distributions credited are not subject to withholding under O.C.G.A. § 48-7-129 if the distributions paid or distributions credited to the nonresident members are subject to withholding under other provisions of Georgia law. Distributions paid are first considered to be distributed out of distributions credited. Any distributions paid for the year that exceed the member's distributions credited are not subject to withholding. Distributions paid or distributions credited shall not include a constructive or deemed distribution (e.g., resulting from a shift of liabilities), a return of investment or return of capital, payments to a member in a capacity other than as a member (e.g., salaries from Subchapter 'S' corporations, rents, or royalties but not guaranteed payments), or previously taxed income.

(e) **Exempt Organizations.** Any distributions paid or distributions credited to an exempt organization which result in unrelated business taxable income, as defined by Internal Revenue Code § 512, will be subject to withholding. Distributions paid or distributions credited to an exempt organization that do not result in unrelated business taxable income are not subject to withholding. In such latter case, the exempt organization shall annually certify in writing to the Entity that the distributions paid or distributions credited do not result in unrelated business taxable income. Such certification must be attached to the Entity's income tax return.

(f) **Insurance Companies.** An insurance company which pays a

tax to Georgia on its premium income is not subject to Georgia income tax and the withholding requirements under O.C.G.A. § 48-7-129. In this case, the insurance company shall annually certify in writing to the Entity that this applies. Such certification must be attached to the Entity's income tax return.

(g) **C-Corporation Members.** Withholding is not required for distributions paid or distributions credited to a C-Corporation member which meets all three conditions listed below. On an annual basis, the C-Corporation member must certify to the Entity in writing that this exception applies. Such certification must be attached to the Entity's income tax return. Such corporation must:

1. Otherwise own property or do business in Georgia;
2. Have filed income tax returns in Georgia for the two (2) immediately preceding years and have paid all Georgia tax liabilities currently due; and
3. Make estimated income tax payments if required.

(h) **Partnerships and Limited Liability Companies.** See paragraph (4) relating to "Tiered Situations" and paragraph (5) relating to "Exception in Tiered Situations" for additional rules applicable to partnerships and limited liability companies (treated as partnerships for Federal income tax purposes) that are members of Entities subject to this regulation.

(3) **Composite Returns.**

(a) **Alternative to Withholding.** In lieu of withholding, the Entity may elect to file a composite income tax return for one or all of its nonresident members using Form IT-CR. The filing of the composite return shall constitute the election. Such election shall be irrevocable and must be made by the due date of the composite return (including extensions, if approved). Once the due date has

expired, the composite return shall not be amended to include or exclude members. However the return must be amended to exclude members who, pursuant to subparagraph (d) of this paragraph, were not eligible to be included on the composite return (i.e. members having income within Georgia from sources other than the Entity). The computation of tax is done by creating a schedule as described in subparagraph (b) of this paragraph. Individuals, corporations, partnerships, limited liability companies, estates, trusts, Qualified Subchapter S Trusts, and Electing Small Business Trusts may be included on the composite return. However, a corporation is still required to file a separate net worth tax return to pay the net worth tax that is due to Georgia. Nonresident members whose aggregate annual distributions paid or distributions credited are less than \$1,000.00 may also be included on the composite return.

(b) **Creating a Schedule.** The Entity will create its own schedule following the examples on Form IT-CR showing the name, address, and identification number, and amount of income as provided in subparagraph (c) of this paragraph for each member included in the computation. The schedule must also include the name, address, identification number, and amount of distributions paid and distributions credited but not paid to any nonresident member not included in the computation of the composite return.

(c) **Computing the Tax.** Using the schedule created pursuant to subparagraph (b) of this paragraph, the members shall compute the tax as indicated in subparagraphs 1. and 2. of this subparagraph. The election of options may be changed annually; however, such election shall not be changed after the filing of the return. The member's income from the Entity's business done in Georgia shall be the sum of the nonresident member's net distributive share of income which is passed through to members and which may be subject to Georgia income tax and the guaranteed payments received by the nonresident member (after the guaranteed payments have

been apportioned to Georgia based on the Entity's apportionment ratio as provided at O.C.G.A. § 48-7-31) and then adjusted as provided in this subparagraph. As such, deductions will not be allowed on the composite return for items of loss, deduction or expense which are subject to other limitations imposed on computing either Federal taxable income, Federal adjusted gross income, or Georgia taxable income, or are otherwise limited by the Internal Revenue Code or the O.C.G.A., such as charitable contributions, investment interest expense, I.R.C. § 179 expense, casualty losses, capital losses, etc. Also, deductions based on self-employment, self-employed health insurance, Keogh or SEP or other deductions normally allowed in computing Adjusted Gross Income are not allowed on a composite return.

1. The following three options shall be available for individual members. Option 1 and Option 2 are only available for nonresident individual members not having income within Georgia from sources other than the Entity:

(i) Option 1 - Filing Status. The Entity may elect to compute the tax by multiplying the member's income from the Entity's business done in Georgia by the applicable tax rate. The "applicable tax rate" shall be that rate from the Tax Rate Schedule which applies to each individual member based on the individual member's filing status.

(ii) Option 2 - Standard Deduction and Dependents. The Entity may elect to compute the tax by reducing the member's income from the Entity's business done in Georgia by the personal exemption and credit for dependents as provided below and then multiplying such income by the applicable tax rate. The "applicable tax rate" shall be that rate from the Tax Rate Schedule which applies to each individual member based on the individual member's filing status. Under this option, the member is allowed to take a standard deduction and a personal exemption and credit for dependents; however, the member should apportion these

adjustments so that adjustments are allowed only to the extent that they apply to Georgia income.

(iii) Option 3 - 6% Rate. If the above option 1 and option 2 are not available for use by the Entity in computing the tax due for an individual member who has income within Georgia from sources other than the Entity or if the Entity otherwise elects, a composite return may be filed using this third option. In such case the individual member shall be allowed to be included on the composite return provided a tax rate of six percent is applied to the member's income from the Entity's business done in Georgia to determine the amount of the tax. Should such individual member be required to otherwise file a Georgia return, then the income that was included using option 3 shall be excluded from the individual member's return.

(iv) For each individual member for whom the Entity uses either Option 1 or Option 2 in computing the tax liability, the Entity must obtain an affidavit each year from the respective individual member, using Form CR-AFF, verifying that the member does not have income from sources within Georgia other than the Entity and verifying the individual member's Georgia filing status.

2. All non-individual members shall apply a tax rate of six percent to the sum of the nonresident member's net distributive share of income which is passed through to members and which may be subject to Georgia income tax and the guaranteed payments received by the nonresident member (after the guaranteed payments have been apportioned to Georgia based on the Entity's apportionment ratio as provided at O.C.G.A. § 48-7-31) to determine the amount of tax.

(d) Members Excluded from the Composite Return. Any nonresident member excluded from the composite return is subject to the withholding provisions and is required to file a Georgia

income tax return, unless otherwise exempted by this regulation or O.C.G.A. § 48-7-129. Likewise, any nonresident member included in the computation of a composite return is not subject to the withholding provisions and is not required to file a Georgia income tax return. Except as provided in subparagraph (c)(1)(iii) of this paragraph, nonresident members having income within Georgia from sources other than the Entity may not be included in the Entity's composite return and shall be subject to the withholding tax imposed by O.C.G.A. § 48-7-129, unless otherwise exempted by this regulation or O.C.G.A. § 48-7-129.

(e) Composite Return Due Date. The due date of the composite return of a calendar year Entity is the same as for a calendar year individual. Extensions and estimated tax payments for filing are the same as for individuals. A fiscal year Entity should file its return on a fiscal year basis and should file its return within 3 ½ months of the fiscal year end. Form IT-303 (application for extension) should be used if an extension of time to file is needed. Form IT-303 only extends the time to file. Accordingly, any tax that is due should be remitted by the original due date of the composite return on form CR-ES (composite estimated tax return).

(f) Amended Composite Returns. Except as prohibited by subparagraph (a) of this paragraph, amended composite returns may be filed during the same periods as individual returns, and may be filed by using the form IT-CR which must be plainly marked "Amended Return".

(g) Consent Agreements. When filing a composite return for shareholders, it is not necessary to include copies of the consent agreements required by O.C.G.A. § 48-7-27(d)(2). However, consent agreements must be attached to the S Corporation return as provided in such code section.

(h) Composite Return Net Operating Losses. The following shall apply with regard to net operating losses:

1. A net operating loss computed on a composite return may be carried to another composite return year. For an individual member, the income for the year or years that the loss is being carried to, must be recomputed using the option (as specified in subparagraph (3)(c)1.) that was used for the loss year before the loss is carried to that year.

2. A net operating loss cannot be carried from a year whereby the member was excluded on the composite return to a year whereby the member is included on the composite return. However, if the net operating loss is carried back from a year whereby the member is included on a composite return to a year or years whereby the member is not included on the composite return and the net operating loss is not fully absorbed in such carryback years, then the net operating loss remaining may be carried to a year where the member is included on a composite return.

3. A net operating loss must be carried from a year where the member was included on the composite return to a year the member files the member's own tax return.

4. An Entity, on behalf of a member, may elect to waive the carry back period of a net operating loss on a composite return. Such election shall be made using the same provisions that would apply to the member as if they were excluded from the composite return.

(4) **Tiered Situations.** Except as provided in paragraph (5), in situations whereby distributions are paid or distributions are credited from an Entity to a member who is an Entity and to any subsequent Entities, the following shall apply:

(a) Withholding is only required by an Entity that:

1. Does business in Georgia on its own and not as a result of being

a member; or

2. Owns property in Georgia on its own and not as a result of being a member;

(b) Any withholding that occurs may be passed through each tier by attaching the G-2-A and providing a schedule which allocates the withholding tax between the members at each tier based upon the profit/loss percentage. Failure to include this documentation will result in the disallowance of the withholding credit. A composite return may be completed at any level. However, if the composite return is not filed by the Entity meeting either condition 1. or 2. of subparagraph (a) of this paragraph, withholding is still required by such Entity, unless otherwise exempted by this regulation or O.C.G.A. § 48-7-129. Tax withheld at one level can be claimed on a composite return at another level.

(c) A member which is an Entity or a corporation must include its pro rata share of the Entity's property, payroll, and gross receipts in its own three factor apportionment formula in determining how much of its income is Georgia income. In determining its income, the member includes its share of the Entity's income before the Entity apportions and allocates its income. *For tax years beginning on or after January 1, 2008, only gross receipts are included in the apportionment formula.*

(d) In determining whether withholding is required, only the members that directly own an interest in the Entity subject to withholding shall be considered.

For example:

1. An Entity that is subject to the nonresident withholding requirements has several members. One nonresident member is also a member in several other Entities that are subject to the withholding requirements. Each of the Entities must withhold on that

nonresident member whether or not the total income/loss from all the Entities would result in a net loss for that member. A loss from one Entity cannot be used to offset the income in another Entity for that member.

2. Company A is subject to the nonresident withholding requirements and is in a tiered situation. Company B is a nonresident member of Company A. Company B has nonresident members, of which one is an exempt organization called Company C. Company A is required to withhold on the full distribution to Company B.

(5) Exception in Tiered Situations.

(a) Nonresident withholding shall not be required for distributions paid or distributions credited to a member which is also an Entity provided such Entity in writing:

1. Elects to withhold at the rate of 4 percent with respect to any distributions paid or distributions credited but not paid to such Entity's nonresident members in the same manner and subject to the same requirements, exceptions (including the exception provided in this paragraph but excluding the exception provided in subparagraph (2)(c)), etc. as if such Entity itself was subject to O.C.G.A. § 48-7-129 and this regulation;

2. Agrees to be subject to personal jurisdiction in this State for purposes of the collection of income taxes and the withholding required by O.C.G.A. § 48-7-129, together with related interest and penalties; and

3. Provides such election and such agreement to the Entity in which it is a member on or before the date such withholding was first required to be paid for the taxable year.

(b) In the event such Entity makes the election as provided in subparagraph (a)1. of this paragraph and such Entity does not withhold at the rate of 4% if required to do so, then such exception shall not apply and withholding will be due as originally required as if such election had not been made.

(c) Each Entity in subsequent tiers shall be entitled to make such election and such agreement provided the Entity in which it is a member makes such election. However, failure by any Entity in any tier to withhold at the rate of 4% if required to do so shall cause withholding to be due as originally required and as if such elections were not made by any Entity in any tier.

(6) Withholding Procedures.

(a) **Registration.** All Entities required to withhold taxes under O.C.G.A. § 48-7-129 must register with the Georgia Department of Revenue by completing Registration Application CRF-002. Registration for withholding requirements is to be separate and apart from the registration required for the payment of payroll taxes.

(b) Payment of Taxes.

1. With respect to distributions paid, payment of taxes withheld must be made to the Georgia Department of Revenue within 30 days of the close of the calendar month in which the distribution is paid to the nonresident member. Payment should be remitted with Form GA-V (withholding payment voucher) and the entity must file the required Form G-7 return.

2. With respect to distributions credited but not paid, payment of taxes withheld shall be due on or before the due date for filing the income tax return for the partnership, Subchapter 'S' corporation, or limited liability company as prescribed in subsection (a) of O.C.G.A. § 48-7-56 without regard to any extension of time for filing such income tax return. Payment should be remitted with

Form GA-V (withholding payment voucher) and the entity must file the required Form G-7 return.

(c) **Withholding Statement.** A Form G-2-A (Withholding on Distributions to Nonresident Members/Shareholders) showing the amount of the distributions paid or distributions credited but not paid, the recipient's name, address, tax identification number, the amount of the Georgia tax withheld, and any other information the Commissioner requires must be furnished to the nonresident member and filed in duplicate with the Commissioner on or before the earlier of the date the income tax return is filed or the due date for filing the income tax return of such partnership, Subchapter 'S' corporation, or limited liability company as prescribed in subsection (a) of O.C.G.A. § 48-7-56 without regard to any extension of time for filing such income tax return. The duplicate Form G-2-A must be submitted to the Department of Revenue along with Form G-1003 (transmittal form) for such taxable year.

(d) **Credit for Withholding; Tax Year for Which Credit can be Claimed.** Recipients of distributions paid or distributions credited but not paid are required to submit a copy of Form G-2-A with their Georgia Income Tax Return in order to receive credit for any Georgia income taxes withheld. Tax withheld from a member's distributions paid or distributions credited but not paid must be claimed as a credit for the member's tax year in which the withholding tax year of the Entity ends.

For example:

1. **Calendar Year Taxpayers.** A calendar year S Corporation makes its sole 2008 distribution paid to shareholders in December and remits withholding for 2008 in January 2009. An individual shareholder may claim a credit on the shareholder's 2008 individual income tax return (generally filed on or before April 15, 2009) for the 2008 taxes withheld by the S Corporation on the shareholder's

behalf.

2. Other than Calendar Year Member. A calendar year partnership remits withholding taxes for 2008 during 2008 and has a corporate partner with a March 31 year end. The corporate partner may claim a credit in its entirety on its corporate income tax return for the year ended March 31, 2009 (generally filed on or before June 15, 2009) for the 2008 taxes withheld by the partnership on its behalf.

3. Other than Calendar Year Entity. An S Corporation with a January 31, 2008 year end remits withholding taxes on behalf of its nonresident shareholders monthly during its fiscal year. A calendar year end shareholder may claim a credit on the shareholder's 2008 individual income tax return (generally filed on or before April 15, 2009) for the taxes withheld by the S Corporation on the shareholder's behalf.

(7) Undue Hardship.

(a) Establishing Undue Hardship. To qualify for undue hardship, the Entity must be experiencing a significant hardship. The Entity must establish undue hardship and each determination will be considered on a case-by-case basis. A written petition must be filed with the Commissioner or his/her delegate requesting an exemption from withholding for an Entity based on undue hardship. The petition shall be made at least sixty (60) days prior to the day on which the withholding tax is due and shall be accompanied by a full and complete explanation of the hardship incurred. This sixty (60) day period may be modified or waived by the Commissioner for reasonable cause. The Commissioner or his/her delegate will carefully consider the basis of the hardship and notify the Entity in writing whether the petition is accepted or rejected. An accepted petition is valid for one year only, and petitions for undue hardship must be requested annually. Failure to receive the Commissioner's notice shall not relieve the Entity from withholding in the manner

prescribed by O.C.G.A. § 48-7-129.

(b) **Circumstances Which do not Qualify.** The following circumstances will not be considered to constitute undue hardship:

1. Inability to pay;
2. Additional cost of record keeping;
3. Paperwork too cumbersome;
4. Missing K-1 data, such as social security number, address, etc.;
5. Unfamiliarity of the filing requirements; or
6. Inadequate records.

(8) **Anti-avoidance Clause.** If the Commissioner reasonably determines that a transaction or payment has been entered into for the purpose of avoiding the provisions of this regulation and O.C.G.A. § 48-7-129, he or she may characterize any payment, or portion thereof, made by the Entity to its member so as to reflect the true substance of the transaction.

(9) **Effective Date.** The provisions set forth in this regulation will apply to taxable years beginning on or after January 1, 2008. Taxable years beginning before January 1, 2008 will be governed by the regulations of Chapter 560-7 as they exist before January 1, 2008 in the same manner as if the amendments thereto set forth in this regulation had not been promulgated.

Authority O.C.G.A. §§ 48-2-12 and 48-7-129.